INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	10

CITATIONS

Cases:	
Bauer v. *Orser*, 258 F. Supp. 338	9, 10
Berenyi v. *District Director*, 385 U.S. 630	7
Boyd v. *United States*, 116 U.S. 616	8
Daniels, Application of, 140 F. Supp. 322	9
Deck v. *United States*, 339 F. 2d 739, certiorari denied 379 U.S. 967	9
Fahey, In re, 300 F. 2d 383	9
House, Application of, 144 F. Supp. 95	9
Loubriel v. *United States*, 9 F. 2d 807	9
Lucas v. *United States*, 188 F. 2d 627	9
United States v. *Boccuto*, 175 F. Supp. 886, appeal dismissed, 274 F. 2d 860	9
United States v. *Bryan*, 339 U.S. 323	9
United States v. *Cohen*, 250 F. Supp. 472, affirmed, 388 F. 2d 464	7, 8
United States v. *Pizzo*, 260 F. Supp. 216	9
Statutes:	
Internal Revenue Code of 1954:	
Sec. 7602 (26 U.S.C. 7602)	2
Sec. 7604 (26 U.S.C. 7604)	4

326-243—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 693

MICHAEL ZAKUTANSKY AND ARTHUR M. JOHNSTON,
PETITIONERS

v.

UNITED STATES OF AMERICA AND RICHARD C. ANDERSEN,
SPECIAL AGENT, INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is not yet officially reported. The district court's opinion, which is set out in the opinion of the court of appeals, is reported at 278 F. Supp. 682.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1968 (Pet. App. 8a), and a petition for rehearing was denied on September 17, 1968 (Pet. App. 35a). The petition for a writ of certiorari was

filed on October 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether enforcement of an Internal Revenue summons directing an accountant to produce his workpapers violated the privilege against self-incrimination asserted by the taxpayer whose returns were under investigation.

STATUTES INVOLVED

The Internal Revenue Code of 1954 provides in pertinent part:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place

named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(26 U.S.C. 7602.)

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*--If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

(25 U.S.C. 7604.)

STATEMENT

The United States brought this action to enforce compliance with four Internal Revenue summonses, issued during an investigation of petitioner Johnston's tax liabilities for the years 1960 through 1965 (R. 1–16).[1] All four summonses sought production of the workpapers of petitioner Zakutansky, the accountant who had prepared Johnston's returns (R. 7–14). The first three were addressed to Zakutansky, the fourth to Johnston. In answers to the government's petition for enforcement, both petitioners alleged that the work-

[1] "R." refers to the printed appendix in the court of appeals.

papers were the property of the taxpayer, Johnston, who claimed that they would incriminate him (R. 17–26). After a hearing, the district court found that the workpapers were the property of Zakutansky, and that Johnston did not have rightful possession of them. Zakutansky was ordered to produce them and to testify in compliance with the summonses (R. 100–111).[2] The court of appeals based its affirmance on its express agreement with the district court's finding of fact that the papers sought were the accountant's work product and had been transferred to the taxpayer's custody only to thwart the investigation. (Pet. App. 6a.)

At the outset of the hearing it was made clear that the only documents sought by the government were materials properly classifiable as Zakutansky's workpapers (R. 27–39).[3] The agents testified that, when they interviewed the accountant on May 11, 1966, he admitted that he had in his possession workpapers which he considered his own property, and they thereupon served him with a summons requesting production (R. 7–8, 41–43, 59–60). Although he appeared as directed on May 23, with counsel, he refused to disclose the papers, asking further time to consider the

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[2] At the request of petitioners, the workpapers were examined by the district court and then placed under seal for inclusion in the record on appeal (R. 28–39, 72–75, 103, 108, 117–119).

[3] The first summons to Zakutansky had directed production of some of taxpayer Johnston's records as well as Zakutansky's workpapers (R. 7), but the other three refer only to the workpapers (R. 9, 11, 13). The agent made the change upon the advice of government attorneys (R. 58).

legal aspects of the matter (R. 42–43). On June 28, a second summons was served upon the accountant,[4] who appeared with counsel on July 8, but again refused compliance (R. 9–10, 43–45).

In considering his next step, the special agent discovered that he had mistakenly dated the second summons as issued on "July 28, 1966," instead of the actual date of issuance, June 28, 1966 (R. 45). On July 20, the agent called the accountant's attorney to advise him of the error and to ask what position he would take.[5] The attorney asked time to consider, but called back on July 25 to say that he would have no comment on the mistake (R. 45–46). The agent immediately issued a third summons to the accountant, identical to the second, with a return date of August 4 (R. 11–12, 46). The accountant appeared, with counsel, on the date directed, but refused to testify and said that he could not produce the workpapers since he had turned them over to his client, Johnston, on July 22 (R. 46–47). After further consideration and consultation with government attorneys, the agent on December 30, 1966, issued a fourth summons for production of the workpapers, this time directed to the taxpayer, Johnston (R. 47–48). Johnston appeared with counsel, admitted that he had the papers given to him by his

[4] As noted in the previous footnote, on the advice of government counsel, this second summons omitted any request for documents which were the property of the taxpayer.

[5] Contrary to the statement of the district court (R. 102), the accountant had not called attention to the erroneous date when he appeared on July 8 in response to the second summons (R. 44).

accountant, but refused to produce them on the ground that they were not workpapers and were his own property (R. 13–14, 48–49, 94–99).

At the hearing, the accountant testified for the defense that he had always regarded the papers as the taxpayer's property, and that he had turned them over to him, at the latter's request, after a summons had been issued for them (R. 61–70, 72–91). The taxpayer did not testify.

The district court, after careful consideration of the documents in question and the testimony about them, found that the papers were the accountant's workpapers, not the taxpayer's property (R. 72–76, 103–104). The court also found that "the transfer of the papers was a mere attempt to thwart the Government investigation" (R. 110), and that it did not give the taxpayer rightful possession of the papers (R. 110–111). The court concluded that in this context the taxpayer was not entitled to assert his privilege against self-incrimination in opposing enforcement of the summonses directed against his accountant (R. 104). Accepting the district court's findings of fact, the court of appeals affirmed (Pet. App. 8a).

ARGUMENT

We are not quite certain on what theory petitioners invoke the taxpayer's privilege against self-incrimination. We shall therefore deal, in turn, with the three possible contentions that may underlie their claim: (1) that the taxpayer was entitled to resist compliance with the summons because he owned the workpapers, or (2) because he had rightful pos-

session of them, or (3) because mere physical control over them was sufficient.

1. Petitioners' formulation of the questions presented in this Court (Pet. 2) and their statement of the facts (Pet. 4–6) indicate that their principal reliance is upon the defense alleged in the district court, *i.e.*, that the documents involved are the property of the taxpayer (R. 17–26, 61–99). That factual contention is, however, asserted, and not argued. It is also contrary to the concurrent findings of the courts below and thus not appropriate for re-examination by this Court. *Berenyi* v. *District Director,* 385 U.S. 630, 635–636. In any event, there was more than ample evidence to support the findings that the documents were the accountant's workpapers and that they belonged to him (R. 103–104, 105–106, 108–110).

2. Petitioners now contend (Pet. 7–8), in reliance upon *United States* v. *Cohen,* 250 F. Supp. 472 (D. Nev.), affirmed, 388 F. 2d 464 (C.A. 9) (Pet. App. 9a–21a), that the courts below erred in holding that, because the taxpayer in this case never obtained rightful possession of the workpapers, he could not refuse to produce them on the ground of self-incrimination. But the *Cohen* case is readily distinguishable. There, the trial judge, giving credit to the accountant's testimony that he always gave up his workpapers upon a taxpayer's request and that he was unaware of the Internal Revenue investigation at the time he transferred the papers to the taxpayer, found that the transfer had been made in good faith and that the taxpayer there had "rightful and indefinite possession in a purely personal capacity" (Pet. App. 12a, n.6). Here, on the con-

trary, where it is obvious that the accountant was well aware of the investigation and had been served with several summonses, the trial judge refused, as was within his province as trier of fact, to believe the accountant's altered contention—contrary to what he had told the investigating agents— that the papers belonged to the taxpayer. Rather, the trial judge found as a fact that the transfer was not in good faith, but was "a mere attempt to thwart the Government investigation" (Pet. App. 8a; R. 110). The court of appeals then agreed that it was "inescapable" that the papers being sought "were not in the unlimited and rightful possession of the taxpayer" (Pet. App. 8a). Whatever may be thought of the accuracy of the findings of fact in *Cohen,* the two cases are quite compatible on the underlying legal question involved. Indeed, the courts below expressly agreed with the proposition that *Cohen* stands for (Pet. App. 4a, 6a): that one who has rightful possession of a document may properly rely on his privilege against self-incrimination to resist an administrative summons for its production. The difference between the two cases is one of fact, not of law.

3. Petitioners quote (Pet. 7–8) a dictum in the *Cohen* opinion which refers to authority for the proposition that mere possession, whether rightful or not, provides sufficient basis for the invocation of the privilege. But it is clear from the very passage quoted that the actual *holding* in *Cohen* rests upon a finding of rightful possession. Moreover, the dictum is contrary to a long line of authorities. In *Boyd* v. *United States,* 116 U.S. 616 (1886), this Court drew

a sharp distinction between a man's private books and papers, which he cannot be required to produce, and other documents which he has in his possession, though not rightfully so. "The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not." 116 U.S. at 623–624. See, also, *Deck* v. *United States,* 339 F. 2d 739 (C.A.D.C.), certiorari denied, 379 U.S. 967 (1965); *In re Fahey,* 300 F.2d 383 (C.A. 6, 1961); *United States* v. *Pizzo,* 260 F. Supp. 216 (S.D. N.Y., 1966); *United States* v. *Boccuto,* 175 F. Supp. 886 (D. N.J., 1959), appeal dismissed, 274 F. 2d 860 (C.A. 3, 1959); *Application of House,* 144 F. Supp. 95, 101 (N.D. Cal., 1956); *Application of Daniels,* 140 F. Supp. 322, 327 (S.D. N.Y., 1956). There is abundant evidence in the record to support the trial judge's finding that the taxpayer's possession of the workpapers was simply an attempt to frustrate the investigation of his income tax returns.[6] The law will not tolerate such "shifts and subterfuges." *United States* v. *Bryan,* 339 U.S. 323, 334; *Loubriel* v. *United States,* 9 F. 2d 807, 808 (C.A. 2, 1926).[7]

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[6] When the papers were transferred on July 22, 1966, petitioners were well aware that the second summons was outstanding (*supra*, p. 5). The mistake in the date obviously caused them no prejudice. Cf. *Lucas* v. *United States*, 188 F. 2d 627 (C.A. D.C.).

[7] Petitioners' reliance (Pet. 9) upon *Bauer* v. *Orser*, 258 F. Supp. 338 (D. N.D.) (Pet. App. 22a–34a), is misplaced. Under the peculiar circumstances of that case, the workpapers involved had never belonged to the accountant. 258 F. Supp. at

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1968.

340, 344–345 (Pet. App. 24a, 32a–33a). Furthermore, when the accountant transferred the papers to their owner he was unaware that the government had just recently taken steps to enforce a summons served on him almost a year previously. 258 F. Supp. at 341–342 (Pet. App. 26a–27a).

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